UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER INC.	)	
AND	)	
REBECCA LYNN OLVEY MARTIN, an individual	)	**CASES 10-CA-175850** **07-CA-176035**
AND	)	
JEFFREY J. REBENSTORF, an individual	)	

PFIZER INC.'S RESPONSE TO THE BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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I. INTRODUCTION

Pfizer Inc. ("Pfizer" or "the Company") submits this brief in response to the Brief filed by the American Federation of Labor and Congress of Industrial Organization as *Amicus Curiae* (the "AFL-CIO"). In the *Amicus* Brief, the AFL-CIO invokes outdated and distinguishable case law, relies on an unreasonable interpretation of the Arbitration Agreement, and suggests that the Board should strike down the confidentiality provision based on imagined hypotheticals rather than defer issues of enforceability and interpretation to the arbitrator charged with interpreting the Agreement, consistent with the Federal Arbitration Act ("FAA"). As discussed more fully below, Pfizer respectfully submits that the Board should reject the AFL-CIO's arguments and – consistent with the General Counsel's position – dismiss the remaining Complaint allegation regarding the Arbitration Agreement's confidentiality provision.

II. ARGUMENT

A. The AFL-CIO's Reliance on *Dish Network* and Other Outdated and Distinguishable Board Precedent Is Misplaced.

The AFL-CIO relies on *Dish Network, LLC*, 365 NLRB No. 47, (2017), and other Board cases that predate *Dish Network* to argue that the confidentiality provision violates the National Labor Relations Act (the "NLRA"). Amicus Brief, at 5-7. This argument is misplaced because those decisions (1) were decided before the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), (2) applied the *Lutheran Heritage* standard that was subsequently repudiated in *The Boeing Company*, 365 NLRB No. 154 (2017), and (3) involved arbitration agreements lacking any kind of disclaimer, as exists in Pfizer's Arbitration Agreement, which specifically recognizes employees' right to engage in protected discussions and activity related to their terms and conditions of employment.

1. The Board Cases Cited by the AFL-CIO Are No Longer Good Law After the Supreme Court's Decision in *Epic Systems*.

The Board cases cited by the AFL-CIO are no longer good law because they predate the Supreme Court's decision in *Epic Systems*, which issued on May 21, 2018. *See Dish Network*, 365 NLRB No. 47 (2017); *Cal. Commerce Club, Inc.*, 364 NLRB No. 31 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128 (2016); *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016); *Prof. Janitorial Serv. of Houston, Inc.*, 363 NLRB No. 35 (2015).

Like the class/collective action waiver provision at issue in *Epic Systems*, a confidentiality provision is a "rule[] under which th[e] arbitration [shall] be conducted". *Epic Sys.*, 138 S. Ct. at 1621-22 (citation omitted). Therefore, the confidentiality provision must be enforced according to its terms under the FAA because the NLRA contains no contrary congressional command as to "the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum". *Id.* at 1625. As the Supreme Court held in *Epic Systems*, the FAA "requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including . . . *the rules* under which that arbitration will be conducted.'" *Id.* at 1621 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)).

Because the confidentiality provision in Pfizer's Arbitration Agreement is a "rule under which the arbitration will be conducted," it must be enforced according to its terms under the FAA. The NLRA contains no congressional command to override the mandate of the FAA with respect to the enforcement of an arbitration agreement that contains a confidentiality provision. As we have cited in our prior briefs, many courts have held that confidentiality provisions are lawful and enforceable aspects of arbitration agreements. *See* Pfizer's Brief in Support of Its Exceptions at 13-14 (citing cases).

The General Counsel's position in this case, like Pfizer's, is based on this key holding of *Epic Systems*, which supersedes any prior Board decision to the contrary – including the decisions cited by the AFL-CIO in its *Amicus* Brief. *See* GC Brief in Support of Exceptions, at 7 ("While it could have been argued that this kind of agreement was unlawful prior to *Epic* (and Counsel for the General Counsel so argued at that time), the Supreme Court has since explicitly decided this issue, and has undeniably authorized such agreements."); *id.* at 9 ("[W]hile *Epic* did not address confidentiality, its holding would compel the conclusion that a confidentiality provision within an arbitration agreement concerning the arbitration is lawful.").

2. The Board Cases Cited by the AFL-CIO Are Also No Longer Good Law Because They Were Decided Based on the *Lutheran Heritage* Standard.

Further, the decisions relied on by the AFL-CIO were decided under the standard of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which the Board subsequently repudiated in *The Boeing Company* because it "[did not permit] the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur," "invalidate[d] facially neutral work rules solely because they were ambiguous in some respect," and "entail[ed] a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions." *The Boeing Company*, 365 NLRB No. 154, slip op. 2 (2017).

The *Lutheran Heritage* standard applied in the decisions cited by the AFL-CIO often led the Board to construe any ambiguity in a work rule against the employer. In overruling that standard in *Boeing*, the Board made clear its view that "*Lutheran Heritage* has required perfection that literally is the enemy of the good" and stated its desire to depart from this "(unattainable) requirement of linguistic perfection" moving forward. *The Boeing Company*, 365 NLRB No. 154, slip op. 2, 10 n.43.

Because the cases cited by the AFL-CIO were decided before *Boeing*, which is now the controlling standard under the NLRA, they are no longer good law. In recognition of this, the Fifth Circuit in *Dish Network* remanded that case to the Board to make new findings with respect to the legality of the confidentiality clause in light of the Board's overruling of *Lutheran Heritage*. *Dish Network, L.L.C. v. NLRB*, 731 F. App'x 368, 369 (5th Cir. 2018) (noting that "the new *Boeing* standard applies retroactively to all pending cases" and that "[b]oth DISH and the Board thus agree remand is necessary").

The confidentiality provision in Pfizer's Arbitration Agreement is lawful under the *Boeing* standard. Contrary to the AFL-CIO's argument, the confidentiality provision does *not* prohibit "discussions and coordination between or among two or more employees regarding employment-related disputes, including those that may be resolved in arbitration.'" Amicus Brief, at 6 (quoting *Cal. Commerce Club*, 364 NLRB No. 31, slip op. 3 n.8 (Member Miscimarra, concurring in part and dissenting in part)). In fact, the confidentiality provision explicitly protects employees' right to discuss the terms and conditions of employment that are the subject of the dispute in arbitration. (SOF at 7.) The confidentiality provision only requires the parties to keep confidential the information that is disclosed in the arbitral process, the submissions to the arbitrator, and the award itself. *Id.* Even then, the confidentiality agreement contains important exceptions, which permit the disclosure of such information "in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties." *Id.*

As the General Counsel argues, the Arbitration Agreement's narrow restriction on the disclosure of documents and submissions received pursuant to the arbitral process "is no different from prohibiting the disclosure of confidential business or personal information an employee may obtain by virtue of his or her position at the company, even though such information might relate to conditions of employment." GC Brief in Support of Exceptions, at 11. Therefore, the confidentiality provision does *not* "significantly implicate Section 7 rights" because it does *not* "prevent employees from discussing terms and conditions of employment, the fact of the arbitration, and/or their claims." *Id.* at 8. As the General Counsel argues, the confidentiality provision "only address[es] the confidentiality of matters that arise in the arbitration proceedings themselves – proceedings created and governed by the arbitration agreement – matters that would not exist but for the agreement itself." *Id.*

For all of these reasons, the confidentiality provision is lawful under prong (i) of the *Boeing* standard because it cannot reasonably be interpreted to prohibit or interfere with the exercise of Section 7 rights.

3. The Board Precedent Cited by the AFL-CIO Involved Arbitration Agreements that Lacked Disclaimers to Protect Employees' Section 7 Rights.

The Board cases cited by the AFL-CIO are distinguishable for another fundamental reason: the confidentiality provisions in those cases did not contain a disclaimer acknowledging employees' Section 7 rights.[1] Here, by contrast, Pfizer's Arbitration Agreement contains a disclaimer which explicitly recognizes employees' right to discuss the wages, hours, or other terms and conditions of employment that may be at issue in an arbitration proceeding. (SOF at

[1] In addition, four of the five arbitration agreements found unlawful in the cases cited by the AFL-CIO contained provisions that, when reasonably construed, interfered with employees' access to the Board and its processes – which is a core right explicitly protected by Section 10(a) of the NLRA.

7) ("Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment."). The confidentiality provision also makes clear that it does not restrict employees from communicating with witnesses or seeking evidence to support their claim in an arbitration proceeding. *Id.* ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding.").

The limited scope of the confidentiality provision, and the express disclaimers therein, distinguish Pfizer's Arbitration Agreement from those that were held to be unlawfully overbroad in the cases cited by the AFL-CIO. The AFL-CIO nevertheless takes issue with Pfizer's disclaimer, asserting that the disclaimer is not sufficiently clear because it states that "nothing in this Confidentiality agreement shall prohibit . . . protected discussions or activity *relating to the workplace*" rather than stating that "nothing in this Confidentiality agreement shall prohibit . . . protected discussions or activity relating to the workplace *that arises from an arbitration proceeding*." Amicus Brief, at 13 (emphasis in original). In essence, the AFL-CIO seeks to require the very type of "linguistic perfection" repudiated by the Board in *The Boeing Company*. When reasonably interpreted, the confidentiality provision in Pfizer's Arbitration Agreement must be read as it was intended – to protect employees' Section 7 rights to discuss the terms and conditions of employment giving rise to a claim in arbitration, to speak with co-workers about their claim, and to communicate with witnesses and marshal evidence in support of their claim.

B. There Are Legitimate Justifications for the Confidentiality Provision.

The AFL-CIO next contends that "it is difficult to imagine any legitimate justification for a blanket confidentiality requirement in employment-related arbitration proceedings, especially one, like that at issue here, that reaches not only the proceeding itself but also the award."

Amicus Brief, at 7-8. Putting aside the AFL-CIO's obvious mischaracterization of Pfizer's confidentiality provision as a "blanket" requirement, there is no doubt that the provision is supported by legitimate justifications which are well-established in case law. For example, the Fifth Circuit in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), explained many of the legitimate justifications for maintaining the confidentiality of an arbitration proceeding and the resulting award:

> If every arbitration were required to produce a publicly available, "precedential" decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding. But part of the point of arbitration is that one "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at 175-76 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The General Counsel agrees that there are legitimate justifications for the confidentiality provision. *See* GC Brief in Support of Exceptions, at 13 ("An agreement to make arbitral proceedings confidential furthers the goals of simplicity, informality, and expedition, and thus parties often impose confidentiality for these and other reasons. Keeping the proceedings confidential may indeed benefit employees as much as employers, particularly in cases where the arbitrator upholds an employee's discharge or otherwise addresses matters that the employee does not want generally made public."); *see also id.* at 12 ("[T]he actual effect of the provision is merely to protect matters inherent to the arbitral process from unwarranted disclosure, to permit the parties to take advantage of the benefits of arbitration free from the concern that otherwise private matters that arise in arbitration will be made public, and to foster trust and confidence in

the arbitration process as an alternative dispute resolution procedure that can protect the parties' interests, including their interest in confidentiality of privileged matters.").

The JAMS Arbitration Rules & Procedures – the rules that are applicable under Pfizer's Arbitration Agreement – reinforce that confidentiality is "part and parcel" of the arbitration process. *See* JAMS Employment Arbitration Rules.[2] Rule 26(a) requires JAMS arbitrators to "maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision." Likewise, Rule 17(d) empowers JAMS arbitrators to resolve disputes regarding discovery issues and Rule 26(b) permits arbitrators to issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information. These rules leave no doubt that confidentiality is a "rule under which the arbitration will be conducted" and is supported by legitimate business considerations. *Epic Sys.*, 138 S. Ct. at 1617.

C. The Board Should Not Strain to Interpret the Confidentiality Provision in a Manner That Might Be Unlawful in a Hypothetical Case.

The AFL-CIO attempts to support its arguments by conjuring a hypothetical situation involving a group of employees seeking to arbitrate claims against the Company under the Fair Labor Standards Act. *See* Amicus Brief, at 16. In the AFL-CIO's hypothetical, an employer produces a written policy regarding the mandatory nature of training in one arbitration proceeding but refrains from producing the very same policy in another identical proceeding, opting instead to have a manager testify that he is not aware of any such policy. *Id.*

The Board should not strain to interpret the confidentiality provision in Pfizer's Arbitration Agreement in a way that might be unlawful in a hypothetical case. *See The Boeing*

[2] Available at https://www.jamsadr.com/rules-employment-arbitration/english (last visited August 2, 2019).

Company, 365 NLRB No. 154, slip op. 9 ("it is likely that one can 'reasonably construe' even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity"). The Complaint alleges that the Arbitration Agreement and its terms are unlawful on their face, *not* as they have been (or theoretically could be) applied. Presented with only a facial challenge to Pfizer's Arbitration Agreement, there is no basis for the Board to opine on hypothetical "as applied" challenges to the Agreement's confidentiality provision. *See Road Sprinkler Fitters, Local 669 (Cosco Fire Protection, Inc.)*, 357 NLRB 2140, 2142 (2011); *Enloe Med. Ctr.*, 348 NLRB 991, 992 n.6 (2006).

Furthermore, the AFL-CIO's hypothetical is not consistent with the terms of Pfizer's Arbitration Agreement, which would *not* prohibit discussion or disclosure of a training policy that is the subject of an arbitration proceeding. The policy would be one of the terms and conditions of employment that is covered by the disclaimer in Pfizer's Arbitration Agreement. (SOF at 7) ("Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.").

D. Disputes Regarding the Interpretation or Application of the Confidentiality Provision in a Particular Case Should Be Decided by the Arbitrator in That Case.

To the extent the confidentiality provision needs to be interpreted or applied consistent with the disclaimer language in a particular case, that is an issue to be determined by the arbitrator based on the particular facts and circumstances of the case. It is not an issue that should be decided by the Board based on imagined hypotheticals raised in this facial challenge to the Agreement. The JAMS Arbitration Rules specifically provide that arbitrators have the jurisdiction and authority to do so. Rule 11(b) provides that any "disputes over the . . . validity,

interpretation, or scope of the agreement under which Arbitration is sought" – including with those respect to the confidentiality provision – "shall be submitted to and ruled on by the Arbitrator." *See* JAMS Employment Arbitration Rules, *supra* n.2. And Rules 11(a) and 22(a) provide that the Arbitrator "shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing" and has the authority to "vary these procedures if it is determined to be reasonable and appropriate to do so." *Id.*

Thus, to the extent an employee argues that the application of the confidentiality provision would chill Section 7 rights in a future case, or is otherwise invalid or inconsistent with applicable law, those arguments should be submitted to the arbitrator who may then tailor the confidentiality rules for the proceeding as he or she deems reasonable and appropriate. This comports with the approach envisioned by the Arbitration Agreement itself,[3] as well as that followed by various courts. *See, e.g., Kilgore v. KeyBank Nat'l Ass'n,* 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) ("In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable."); *CarMax Auto Superstores Cal. LLC v. Hernandez,* 94 F. Supp. 3d 1078, 1122 (C.D. Cal. 2015) (same).[4]

[3] The Agreement provides that "[employees] have the right to challenge the validity of the terms and conditions of this Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against [them] in the event [they] choose to do so." (J. Ex. 3, at § 2.d.)

[4] This approach is also consistent with the views expressed by former Chairman and Member Miscimarra in his concurring and dissenting opinions in the cases cited by the AFL-CIO. *See Century Fast Foods,* 363 NLRB No. 97, slip op. at 3-4 ("Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims. . . . Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims."); *Prof. Janitorial Serv. of Houston, Inc.*, 363 NLRB No. 35, slip op. at 5 (same); *Cal. Commerce Club, Inc.*, 364 NLRB No. 31, slip op. 2-3 (same).

The Board should confine its decision here to the facial challenge that is before it, find that the confidentiality provision is lawful as written, and defer future hypothetical "as applied" challenges to the arbitrators who are charged with interpreting the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, Pfizer respectfully submits that the Board should find that the Arbitration Agreement's confidentiality provision is lawful and dismiss the remaining allegation of the Consolidated Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer Inc.'s Response to the Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* have been electronically filed and served upon the following this 2nd day of August 2019 by e-mail:

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